

NO. 16-0127

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

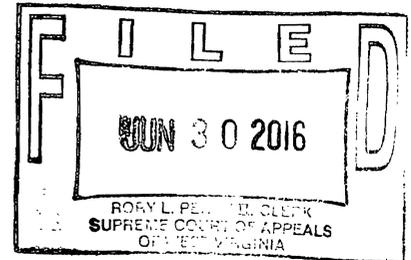
VALENTINE & KEBARTAS, INC.

DEFENDANT BELOW/PETITIONER

v.

GARY J. LENAHAN

PLAINTIFF BELOW/RESPONDENT,



BRIEF OF RESPONDENT GARY L. LENAHAN

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BRIEF OF RESPONDENT GARY L. LENAHA

I. Statement of the Case

Petitioner's Statement of the Case is more accurately described as a Summary of argument and Respondent declines to concur with it. The essential facts are as follows:

Respondent herein and Plaintiff below, Gary Lenahan, received two-hundred fifty-two (252) telephone collection calls from Petitioner Valentine & Kebartas, a debt collector. Petitioner was attempting to collect a debt that Gary Lenahan allegedly owed to ADT Security ("ADT"), a home security company. Defendant only called a single telephone number that belonged to Respondent's cellular telephone. Respondent did not answer the first two-hundred fifty (250) collection calls. The initial twenty-two (22) calls took place over approximately two weeks, beginning March 10, 2012, and concluding on March 25, 2012. Beginning March 26, 2012, Petitioner took the affirmative action of significantly increasing the frequency of the

collection calls and seventeen such calls were placed from March 26 through March 28.¹ A.R. at 327.² This is the specific fact which the lower court seized upon in making its finding that, beginning on March 26, the collection activities of Petitioner crossed the line and were found to be unreasonably oppressive or abusive as prohibited by the *West Virginia Consumer Credit and Protection Act* (“WVCCPA”), *W. Va. Code* §§ 46A-1-101 *et. seq.*, discussed herein.

II. Summary of Argument

This case presents the question of whether Petitioner’s actions as a debt collector toward Respondent, the alleged debtor, were unreasonably oppressive or abusive and thus violated provisions of the WVCCPA, specifically § 46A-2-125.

Petitioner assigns four errors to the Circuit Court’s final verdict Order. First, Petitioner assigns error to the Circuit Court’s conclusion of law that the sheer volume of calls, by itself, can constitute a violation of § 46A-2-125; and argues that the conclusion of law is implicit in the Court’s ruling. However, the Circuit Court did not conclude that the sheer volume can constitute a violation of the Act. Instead, the lower Court concluded that, as a matter of law, it is possible for continuous and repeated telephone calls to which there is no response to constitute abuse, unreasonable oppression, or harassment *if* the attempts continue beyond the point at which a reasonable person³ should conclude that communication is not desired. This conclusion of law is perfectly consistent with the relevant statutory language, the prior rulings of this Court, and with several federal court cases interpreting the WVCCPA. It is not an abuse of discretion.

¹ The frequency of calls is not at issue in this case as the basis for the counting of calls was Defendant’s own records which served as the only exhibit Plaintiff introduced at trial.

² The pages in the Appendix Record are numbered in this format: VL0000xxx. In order to shorten the citations in this brief, references to the Appendix Record will omit the “VL0000” and be in this format: A.R. at xxx.

³ Although the 2015 amendment to § 46A-2-125 are not applicable here as discussed in section V(C) below, it can be noted that the “reasonable person” standard is there specifically adopted in the new version of § 46A-2-125(d).

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The Petitioner may place telephone calls in an attempt to collect a debt so long as those calls are not unreasonably oppressive or abusive. Without limiting that general prohibition of the WVCCPA, the legislature went on to define a number of circumstances that statutorily qualify as abuse or unreasonable oppression, such as calling any person with the intent to annoy, abuse, or oppress that person. The Court below found that the first twenty two telephone calls, placed over a period of about two weeks did not violate the Act. Thereafter, however, Petitioner dramatically increased the number and the frequency of the calls; in fact, Petitioner made seventeen calls over a period of only three days beginning March 26, 2012; several of those calls were separated by only a matter of minutes. The Court seized upon a reasonable person standard to conclude when one should ascertain that the calls are no longer desired and Petitioner's increase of the call frequency to find a violation of § 46A-2-125 and Petitioner's intent in making the calls. The court did not arbitrarily and simply find that the sheer volume of calls, by itself, constituted a violation of the Act.

Second, Petitioner assigns error to the trier of fact's conclusion that Petitioner knew the identity of the person who controlled the telephone Petitioner called 252 times. That finding of fact is supported by the record and; furthermore, the conclusion is irrelevant. Petitioner argues that it was erroneous for the Court below, sitting as the trier of fact, to conclude that the 252 telephone calls Petitioner placed to Respondent were, in fact, intended to reach the Respondent. Not only is that argument facially absurd, but it is also irrelevant because the applicable code section protects "any person", not just those who are actually indebted to the collector,⁴ from unreasonably oppressive or abusive collection calls.

⁴ This provision and its broad application is unique to § 46A-2-125. Every other prohibitive section of the WVCCPA, § 46A-2-124, § 46A-2-126, § 46A-2-127, and § 46A-2-128 regulate communications and acts directed at "consumers." That term is defined at § 46A-2-122(a) as "any natural person obligated or allegedly obligated to pay

Even if the Petitioner had been attempting to reach someone else, it was Respondent's mobile telephone that Petitioner called 252 times. Petitioner obtained Mr. Lenahan's telephone number from its principal, ADT, the party to whom the debt was allegedly owed, and ADT had in fact reached Respondent at that telephone number. Therefore, Petitioner not only knew exactly whose telephone it was causing to ring, but there is also no evidence in the record to suggest that Petitioner ever doubted that the number belonged to Respondent, or that Petitioner ever took any acts or measures to obtain a different contact number.⁵ Instead, Petitioner just called Respondent's telephone *ad nauseum*. There was no error in the Circuit Court's findings of fact, as its conclusions are supported by the record.

Third, Petitioner assigns error to the Circuit Court's refusal to apply 2015 substantive amendments to the WVCCPA retroactively. However, the amendments cited by Petitioner were passed by the legislature after Petitioner committed its bad acts, after Respondent filed his Complaint, and after the bench trial in this matter concluded. The Circuit Court made no error in refusing Petitioner's request to apply the statutory amendments to the WVCCPA retroactively.

Finally, Petitioner's fourth assignment of error claims that the Circuit Court, committed error in concluding that unanswered telephone calls placed by Petitioner to Respondent by a computerized auto dialer, can by themselves constitute a violation of § 46A-2-125. As shown herein, the Court never made any such finding that unanswered calls, *without something more*, violate the WVCCPA. Instead, the undisputed testimony is that Petitioner programmed and controlled the auto dialer which placed the telephone calls and that this dialer was programmed

any debt." Therefore, Petitioner's argument that it allegedly didn't know to whom it was directing the telephone calls is specifically not applicable to § 46A-2-125.

⁵ It is exceedingly common and simple for a modern debt collector to obtain contact information for an alleged debtor. The debt collector need only perform "skip tracing" or obtain a "skip tracing report." Essentially, this is akin to a credit report that lists addresses, telephone numbers, and other information depending on the report. In this case, Petitioner's own witness indicates that no skip tracing was done with regard to Respondent, as no skip tracing report was contained in the file. Tr. 82-83, A.R. at 088-089.

to increase the frequency and volume of calls in response to Respondent's refusal to answer the first 22 telephone calls. Petitioner also programmed the dialer to terminate any collection calls if a voicemail was detected; intentionally preventing Petitioner from gleaning any valuable information, such as the identity of the person whose voicemail had been reached, from the telephone call. Petitioner is not entitled to any protection from liability simply because it utilized a computer instead of a human and that system was designed to remain willfully ignorant. As such, the Court, sitting as trier of fact, did not make any clearly erroneous findings and at no point abused its discretion.

III. Statement Regarding Oral Argument and Decision

Contrary to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, Petitioner made no statement regarding oral argument. Respondent maintains that the appeal is frivolous, that there is plenty of authority to uphold the Verdict Order of the Trial Court, and that the facts and legal arguments are adequately presented in the briefs and record on appeal. Nonetheless, in a case such as this where a final Order resulting from a bench trial is at issue and Petitioner claims insufficient evidence to support the Order, Respondent requests the case be calendared for Rule 19 oral argument.

IV. Standard of Review

Syllabus Point 1 of *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996) states the appropriate standard of review for this case as follows:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

In the body of the opinion, the Court goes on to clarify that “[a] circuit court’s finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.* at 334, 543. “However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010).

V. Argument

A. As a matter of law, the Court below correctly interpreted and applied both *W. Va. Code* §§ 46A-2-125 and 46A-2-125(d).

The Petitioner first assigns error to the Circuit Court’s conclusion as a matter of law that “the number of phone call attempts made by a debt collector to a debtor, within a given period of time, without other evidence of inappropriate communication, can support a finding that the debt collector caused ‘... a telephone to ring or engaging a person in telephone conversation repeatedly or continuously ... with the intent to annoy, abuse, oppress’ as prohibited by *W. Va. Code*, § 46A-2-125(d)”.

As an initial matter, the Circuit Court made no such explicit finding. Rather, the Court actually stated that

it is the opinion of this court that as a matter of law it is possible that the sheer number of attempts to communicate to which there is no response may constitute abuse, oppression, or harassment **if the attempts continue beyond the point at which a reasonable person should conclude that communication is not desired.** It is a question of fact whether and at what point that number reached and whether subsequent attempts to communicate are motivated by an intent to annoy, harass, or oppress.

May 22, 2015 Memorandum at *3, A.R. at 327 (emphasis added). The Petitioner’s argument entirely ignores the Court’s finding of fact that there was a sudden and dramatic increase in the

number and frequency of the calls after the first two weeks of Petitioner's collection campaign was unsuccessful. Petitioner's assignment of error also ignores the Court's inference from that finding of fact that this sudden and dramatic increase was evidence of Petitioner's intent to annoy or harass the plaintiff rather than to communicate with him. *Id.*

Petitioner argues that its formulation of the Circuit Court's implicit conclusion of law⁶ is somehow inherent in the first three conclusions of law in the Verdict Order entered by Judge Burnside which state:

1. *W. Va. Code* § 46A-2-125 generally prohibits debt collectors from unreasonably oppressing or abusing any person in connection with the attempt to collect a debt. The statute expressly prohibits "Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number." *W. Va. Code Ann.* § 46A-2-125(d).

2. Though there is little analysis by the West Virginia Supreme Court of Appeals, this Court has reviewed and agrees with Judge Copenhaver's interpretation of §125: "The plain language of the section, broadly construed, warrants such a conclusion. The statute explains that calls can be unreasonably oppressive or abusive in three ways: (1) when the calls are made "repeatedly or continuously;" (2) when the calls are made "at unusual times;" or (3) when the calls are made "at times known to be inconvenient." *Ferrell v. Santander Consumer USA, Inc.*, 859 F. Supp. 2d 812 (S.D.W. Va. 2012).

3. The question for the Court is: did Defendant's unanswered telephone calls constitute abuse or unreasonable oppression, or did Defendant intend to harass Mr. Lenahan when it continued to place collection calls to a number he never answered. In this case, as in *Ferrell*, that question is focused on the "repeated or continuous" aspect of the telephone calls. Additionally, the Court will look to Defendant's testimony to determine Defendant's intent in making the telephone calls and to determine what legitimate purpose, if any, was advanced by the telephone calls.

A.R. at 003-004. Judge Burnside was correct "that there is little analysis by the West Virginia Supreme Court of Appeals" of *W. Va. Code* § 46A-2-125 (West 1974)⁷, which provides:

⁶ Petitioner's entire fourth assignment of error would have been unnecessary had the Court below actually made the explicit conclusion of law Petitioner complains of in the first assignment of error.

No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. **Without limiting the general application of the foregoing**, the following conduct is deemed to violate this section: ...

(d) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number.

(emphasis added).

Even had the Court below made the conclusion of law alleged by the Petitioner, that conclusion of law would not be incorrect as a matter of law. There are two problems with Petitioner's position that the evidence of phone calls alone, absent further communication from the Respondent, can never be the basis for a conclusion that the debt collector's conduct is abusive, both of which arise from the language of the statute itself.

1. ***W. Va. Code § 46A-2-125 Prohibits Unreasonable Oppression or Abuse in Any Form by Debt Collectors Attempting to Collect a Debt***

First, the conduct prohibited by *W. Va. Code § 46A-2-125* is simply unreasonable oppression or abuse by any debt collector in connection with the attempt to collect any claim alleged to be due and owing. In other words, *any* finding of fact by a court that a debt collector's conduct is unreasonably oppressive or that such conduct is abusive is sufficient to support a conclusion of law that such conduct is prohibited by § 46A-2-125, so long as that finding of fact is not clearly erroneous.

This position is in accord with this Court's consistent and repeated interpretation of the remedial nature of the WVCCPA, *W. Va. Code §§ 46A-1-101 et seq.* As noted by Judge

⁷ This section was modified by the Legislature in 2015. As discussed in Section V (C) below, that modification is not germane to this case.

Copenhaver in the case of *Ferrell v. Santander Consumer USA, Inc.*, *supra*, “[t]he West Virginia Supreme Court of Appeals has indicated that the WVCCPA is to be construed broadly:

The purpose of the [WVCCPA] is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. As suggested by the court in *State v. Custom Pools*, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988), “[i]t must be our primary objective to give meaning and effect to this legislative purpose.” Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.

McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516, 523 (1995) (internal citations omitted)”. *Ferrell*, 859 F.Supp.2d at 815. *Accord*, *Bourne v. Mapother & Mapother, P.S.C.*, 998 F.Supp.2d 495 (2014). *See generally* *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (restating and confirming the conclusion cited in *Ferrell*).

This position is also supported by the very next sentence in § 46A-2-125, which states that “[w]ithout limiting the general application of the foregoing, the following conduct is deemed to violate this section” (emphasis added). Under this “umbrella provision,”⁸ it is clear that the Legislature intended that a debt collector’s conduct need only rise to the level of unreasonable oppression or abuse to be deemed violative of the act.

2. **In this case, however, the Court below made specific findings of fact that led it to conclude that the Petitioner’s conduct was intended to annoy, abuse, oppress, or threaten Respondent, and those findings fully support the Court’s conclusion the Respondent violated *W. Va. Code* § 46A-2-125(d).**

W. Va. Code § 46A-2-125(d) provides, in relevant part, that “[c]ausing a telephone to ring ... with intent to annoy, abuse, oppress or threaten any person at the called number” is specifically prohibited. Judge Burnside’s third conclusion of law is entirely consistent with the

⁸ *See Bourne, supra*, at 998 F.Supp.2d at 502.

plain reading of the language in § 46A-2-125(d). As discussed in the next section of this Argument, Judge Burnside made several findings of fact that fully support a conclusion that Respondent's conduct was intended to annoy, abuse, oppress, or threaten Respondent. Specifically, the Court below found that, after the first 22 calls over a two week period, a sudden increase in the frequency of the calls had no conceivable purpose other than to annoy, abuse, oppress, or threaten Respondent. Given these findings of fact, it was not an abuse of discretion for Judge Burnside to conclude that Respondent's conduct violated § 46A-2-125(d).

In *Ferrell v. Santander Consumer USA, Inc.*, *supra*, Judge Copenhaver's interpretation of *W. Va. Code* § 46A-2-125 was similar:

Plaintiffs have presented a genuine issue of material fact with regard to whether Santander acted with the requisite intent required by § 46A-2-125(d). The plain language of the section, broadly construed, warrants such a conclusion. The statute explains that calls can be unreasonably oppressive or abusive in three ways: (1) when the calls are made "repeatedly or continuously;" (2) when the calls are made "at unusual times;" or (3) when the calls are made "at times known to be inconvenient." § 46A-2-125(d). Plaintiffs have directed the court to records indicating defendant made "repeated or continuous[]" calls to plaintiffs. That is sufficient to preclude summary judgment on plaintiffs' claims arising under the Abuse Provision in Count I.

Ferrell at 816-817. As discussed below, there is more than enough evidence in the instant matter to support a finding that Petitioner debt collector both placed calls repeatedly and continuously; and, moreover, that Petitioner did so with the intent to annoy, abuse, oppress or threaten any person at the called number.

In support of its brief, Petitioner draws this Court's attention to *Bourne v. Mapother & Mapother, P.S.C.*, *supra*. The fact situation in *Bourne* was significantly different. Most importantly, the number of calls at issue in *Bourne* was twenty-seven (27) over eight (8) months, not the two-hundred, fifty-two (252) calls at issue here. In *Bourne*, a debt collector in Kentucky (Mapother) was attempting to collect two different debts, apparently owed to unrelated creditors,

from two different debtors. The first debtor, Richard Bourne, the plaintiff in the case, informed the debt collector that he was represented by an attorney⁹. The second debtor was Plaintiff's aunt, Maxine Bourne. The issue was that Mapother had been given the same telephone number for both him and his aunt. After Mr. Bourne informed the debt collector that he was represented by an attorney, he received at least 27 phone calls at his home phone from Mapother, and he filed suit against them for violations of the WVCCPA. Mapother asserted that all telephone calls placed after Mr. Bourne informed them that he was represented by counsel were an attempt to contact his aunt, not Mr. Bourne himself. *Bourne*, 998 F.Supp.2d at 499.

The Court in *Bourne* granted Defendant's Motion for Summary Judgment, which included a dismissal of Mr. Bourne's claims under *W. Va. Code* § 46A-2-125. The Court held that twenty-seven calls over eight months "**without additional evidence of abuse**" does not rise to the level of oppression or abuse prohibited by the statute. *Id.* at 502 (emphasis added). However, the Court acknowledged the factual inquiry necessary for a §125 analysis and noted:

The phone calls to plaintiff's residence were made from January to August of 2012... The volume and nature of these communications do not evince an intent to annoy, abuse, oppress or threaten. Even accepting that twenty-seven phone calls over the course of eight months at normal times of the day could be considered causing the telephone to ring "repeatedly or continuously"—a proposition that is highly doubtful—plaintiff has failed to establish that Mapother intended to annoy, abuse, oppress or threaten plaintiff or anyone else.

As noted *supra*, the Court made clear in its ruling that no additional evidence about the calls, other than their mere occurrence, was offered to oppose Mapother's Motion for Summary Judgment. This is contrary to the facts of this case which show that Petitioner was not the first entity to call the Respondent in an attempt to collect this alleged debt, and that after two weeks of unanswered telephone calls from Petitioner, the Petitioner made a conscious decision to

⁹ It is illegal for a debt collector to communicate directly with any consumer after it appears the consumer is represented by an attorney pursuant to *W. Va. Code* § 46A-2-128(e).

escalate its collection campaign with a surge of seventeen (17) calls in three days, some of which were separated by a matter of minutes. As Judge Burnside noted in his May 22 Memorandum, “a continued silence despite repeated attempts to communicate should eventually be understood by a reasonable person as the signal of a preference not to communicate...a continued silence despite repeated attempts to communicate should eventually be understood by a reasonable person as the signal of a preference not to communicate.”, *id.* at *2, A.R. at 326. One must ask “why the surge?” The Circuit Court heard the evidence and answered that the Defendant intended to annoy or harass the Respondent to answer Petitioner’s calls and pay a debt he denied owing.

Finally, the *Bourne* Court came to its decision after reviewing four other federal court cases from West Virginia with similar numbers and frequencies of collection telephone calls. Two of those cases resulted in a debt collector Defendant’s Motion for Summary Judgment being granted: *White v. Ally Fin. Inc.*, 2:12-cv-00384, 2013 WL 1857266 (S.D.W.Va. May 2, 2013) (Goodwin, J.) (twenty-one calls over the course of six months) and *Adams v. Chrysler Fin. Co., LLC*, 5:11-cv00914, 2013 WL 1385407 (S.D.W.Va. Apr. 3, 2013) (Berger, J.) (Defendant’s records reflected “more than thirty-five (35) attempts to contact Plaintiff”).

Significantly, in *Bourne*, the Court also found two cases in which Defendant’s motion for summary judgement on WVCCPA claims were *denied*, both with significantly higher call volumes. In *Ferrell, supra*, there were 72 calls were made to plaintiffs over a two-month span of time, and the Court denied the debt collector Defendant’s Motion for Summary Judgment with regard to the Plaintiff consumer’s §125 claims finding that “[t]he plain language of the section, broadly construed, warrants such a conclusion” when the Plaintiff directed the Court’s attention to logs which showed 72 repeated and continuous collection telephone calls. *Ferrell* at 816. In

the other case with significantly more calls reviewed by the *Bourne* court, *Duncan v. JP Morgan Chase Bank, N.A.*, 5:10-cv-01049, 2011 WL 5359698 at *4 (S.D.W.Va. Nov. 4, 2011) (Berger, J.), the Court denied summary judgment on the basis of evidence of at least 68 calls over an eleven-month time frame. In doing so, Judge Berger declined the Defendant debt collector's invitation to apply an interpretation of the statute which required a finding of "something more" than the collection calls by themselves, or a "volume-plus" analysis. In doing so, Judge Berger found that the calls, by themselves, could maintain a cause of action pursuant to §125. As discussed below, the number of calls in *Ferrell* and *Duncan* are far, far less than the 252 calls at issue in this case.

Accordingly, *Bourne*, with its 27 calls at issue, is wholly distinguishable from the instant action. This matter concerns approximately ten times as many calls in approximately the same period of time. No other evidence was presented in *Bourne* other than the number of calls. In the instant action, as discussed below, there are additional findings of fact that supported a conclusion that the intent of the calls after the initial twenty-two (22) was to annoy, abuse, oppress, or threaten Respondent in an attempt to collect an alleged debt.

Neither *Bourne* nor any of the federal court cases from West Virginia discussed therein stand for the proposition which Petitioner advances – that, as a matter of law, there must be some evidence of additional communication from Respondent required in addition to the total number of calls, frequency of calls, and other evidence surrounding the calls for a debt collector to be held liable under §125(d). Defendant's assertion, carried to an extreme, would lead to the conclusion that 10 calls a day, 100 calls a day, or 1000 calls a day could never be considered to be abusive, as long as the person receiving the calls never answers the telephone.

Finally, Judge Burnside's reasoning is fully explained in his Memorandum to the parties dated May 22, 2015, A.R. 325-328, and incorporated by reference into his Verdict Order. *See* A.R. 001. He concludes as a matter of law that

...it is possible that the sheer number of attempts to communicate to which there is no response may constitute abuse, oppression, or harassment if the attempts continue beyond the point at which a reasonable person should conclude that communication is not desired. It is a question of fact whether and at what point that number reached and whether subsequent attempts to communicate are motivated by an intent to annoy, harass, or oppress.

This conclusion is consistent with both the *Ferrell* and *Bourne* cases, both of which are accurately described and discussed in Judge Burnside's Memorandum. A.R. at 327. This conclusion is consistent with a plain reading of the law and this Court's numerous opinions finding that the WVCCPA is intended to provide "an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action" and that the WVCCPA must be "liberally construed" to protect consumers from unfair, illegal, and deceptive business practices." *See Barr v NCB Management Services, Inc., supra*. Should this Court elect to issue a signed opinion in this case, Judge Burnside's conclusion of law quoted above is an appropriate and concise syllabus point.

Defendant's position is absurd in that it places a burden on the Respondent (and, by extrapolation, on all consumers) to give in to Petitioner's harassment and engage the debt collector in conversation to state the obvious: that the calls are not wanted. Obviously, this conclusion is absurd, as it shifts the inquiry from the acts of the debt collector to the alleged debtor. Petitioner even admits that its position on this assignment is unsupportable when it admits that it "would be amiss in not stating that it does not argue a debt collector could call a debtor 100 times a day and be isolated from liability". *See* Petitioner's Brief at 21. Liability

under *W. Va. Code* § 46A-2-125 is a fact based analysis and the facts herein fully support the lower court's conclusions of law.

B. Petitioner's assertion that it did not know it was calling the Respondent 252 times is as absurd as it is irrelevant.

Petitioner's second assignment of error is that the "lower Court committed error in making a factual finding that Defendant knew it was calling Respondent based upon the fact that the calls were made to Respondent's cell phone which had a voice mail greeting and that the original creditor gave Defendant the number it had associated with Respondent's account". Of Petitioner's four assignments of error, this one stands out as particularly unfounded.

The Court's findings of fact are:

3. According to Defendant's records, Defendant placed two-hundred fifty-two (252) telephone calls to [Plaintiff's] telephone.
4. Defendant only attempted to reach Mr. Lenahan at a single telephone number and no evidence was presented at trial to suggest that Defendant ever attempted to locate an alternative telephone number for Mr. Lenahan.
5. At the outset of its collection campaign, Defendant sent a single letter to Mr. Lenahan on March 9, 2012.
6. Of the two-hundred fifty-two (252) telephone calls place to Mr. Lenahan between March 10, 2012 and November 17, 2012, the first two-hundred fifty were not answered.

Other findings of fact are included within some of the Verdict Order's conclusions of law:

4. It is clear from the testimony that Mr. Lenahan knew that Defendant was the entity causing his telephone to ring. The telephone Defendant was calling was equipped with Caller ID. Furthermore, a letter was sent to Mr. Lenahan's home which outlined the debt that Defendant was attempting to collect upon before the first call was placed.
5. Likewise, it is clear that Defendant knew that it was calling Gary Lenahan. His telephone number was provided to Defendant by ADT. Additionally, Defendant's collection records repeatedly show that an answering machine was detected and Mr. Lenahan has already established through testimony that his outgoing message identified himself as the owner of the telephone number.

Petitioner's assertion that "the lower Court made one key erroneous conclusion of fact: that Defendant knew it was calling Gary Lenahan," Petitioner's Brief at 7, and that this conclusion was "based solely upon the volume of unanswered calls made to a phone number that Defendant had no way of knowing was Plaintiff's phone." *Id.* at 9, is unfounded.

1. Petitioner's assertion that it had no way of knowing it was calling Respondent is contrary to the facts in the record

Elsewhere in its brief, Petitioner admitted that "the phone number for Plaintiff [had been] given to V&K by the creditor ADT". *Id.* at 6; *see also* Tr. at 13, A.R. at 020 (Lynn Marie Diaz, an employee of V&K, admitting that V&K called a specific telephone number "in order to reach Mr. Lenahan"); Tr. at 14, 18 A.R. at 021, 025 (Ms. Diaz admitting that that telephone number had been provided by their client); and Tr. at 67, A.R. at 073 (Ms. Diaz admitting that the client that hired V&K was ADT Security).

Ms. Diaz, Petitioner's employee, admitted that ADT not only provided Gary Lenahan's telephone number to Petitioner, but that ADT would have attempted to collect their own debt before engaging Petitioner to collect the alleged debt on ADT's behalf. Tr. at 68, A.R. at 074. Moreover, Mr. Lenahan testified that he spoke with ADT when they called him and explained that he didn't owe them any money. Tr. at 136, A.R. at 0142. ADT, then, knew very well that the number that they provided to Petitioner was correct and there is not a single thing in the record to suggest that Petitioner ever doubted that the telephone number it was calling belonged to someone other than the Respondent.

2. Petitioner's assertion that it had no way of knowing it was calling Respondent, even if true, would not affect the outcome of this case.

Petitioner's assertion, however, is a red herring because §125 protects "any person." So, as long as the telephone calls are deemed to violate § 46A-2-125, it doesn't matter whether the

illegal calls were actually directed to the intended target, Gary Lenahan, or some other person – whoever received the calls had a cause of action under §125. Here, Defendant admits it called the same phone number more than 250 times and that after the first 22 calls, the number and frequency dramatically increased over the next three days. Petitioner presented no evidence to suggest it wasn't confident whom it was attempting to call. Petitioner didn't call random numbers out of the blue trying to contact Mr. Lenahan – it called the single phone number that ADT provided that ADT knew to be correct.¹⁰ But, again, it doesn't matter, because even if Petitioner had the wrong telephone number and was calling someone other than Gary Lenahan; then that person would still have the same cause of action Respondent has here because that person would necessarily qualify as “any person.”

The standard of review for overturning findings of fact by the Court below is the “clearly erroneous” standard. Judge Burnside's findings and conclusions of fact in both his Memorandum of May 22, 2015 and in his Verdict Order are fully supported by the record in this case. Moreover, few if any of these findings of fact were disputed. There is simply no basis for this Court to conclude any of Judge Burnside's factual findings or conclusions were clearly erroneous.

¹⁰ The fact that V&K used a computer dialer to generate the calls to Mr. Lenahan certainly doesn't absolve V&K of the responsibility for making the calls as Petitioner appears to argue in its fourth assignment of error. Ms. Diaz admitted that the computer calls were from V&K, Tr. at 17, A.R. at 024. She also testified that V&K specified the telephone number to be called and the number of calls that the computer should make each day. Tr. at 25, A.R. at 032:

- Q Okay. And campaign, I think I know what it means, but it's generally the company decides this is how we're going to program the computer for this period of time --
- A Right.
- Q -- to try to collect this particular debt; is that correct?
- A Right. There's a certain amount of calls that are made per day loaded on a campaign boosted by LiveVox that would call these campaigns.

C. The lower Court’s decision to not apply the 2015 Amendments to *W. Va. Code* § 46A-2-125(d) was entirely correct.

The precise question raised by the Petitioner is whether a statute that purports only to “clarify” existing law can have retroactive effect. This has recently been answered by the West Virginia Supreme Court of Appeals in *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). In that case, the Legislature sought to overturn the Court’s decision in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) by amending *W. Va. Code* § 33-6-30. The amendatory language provided in relevant part that

It is the intent of the Legislature that the amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, [208 W.Va. 36,] 537 S.E.2d 882 (2000).

Findley at 92, 819 (emphasis in original).

Despite this language, the Court in *Findley* observed that the Legislature itself has established by statute the rule that a “statute is presumed to be prospective in its operation unless expressly made retrospective”. *W. Va. Code* § 2–2–10(bb) (1998). *Findley* at 92, 819. Thus,

‘[t]he presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.’ Pt. 4, syllabus, *Taylor v. State Compensation Commissioner*, 140 W.Va. 572[, 86 S.E.2d 114 (1955)].” Syl. pt. 1, *Loveless v. State Workmen’s Comp. Comm’r*, 155 W.Va. 264, 184 S.E.2d 127 (1971). *Accord* Syl. pt. 2, *Conley v. Workers’ Comp. Div.*, 199 W.Va. 196, 483 S.E.2d 542 (1997); *State v. Bannister*, 162 W.Va. 447, 453, 250 S.E.2d 53, 56 (1978). Thus, “[t]he general rule is that statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive.” *Loveless*, 155 W.Va. at 266, 184 S.E.2d at 129 (citations omitted).

Id. The Court did note that statutory changes that are purely procedural in nature are given retroactive effect, because such legislation does not negatively affect one's substantive rights.

Id. Procedural amendments were not at issue in *Findley*, and they are not at issue here. In *Findley*, the Court observed that it has "specifically [] held that

'[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.' Syllabus Point 2, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. pt. 2, *Smith v. West Virginia Div. of Rehabilitative Servs. & Div. of Pers.*, 208 W.Va. 284, 540 S.E.2d 152 (2000). *Findley* at 93, 820. Justice Cleckley also stated in *Public Citizen, Inc. v.*

First Nat. Bank in Fairmont, *supra*:

Under West Virginia law, a statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application. *See Mildred L.M. v. John O.F.*, 192 W.Va. 345, 351–352 n. 10, 452 S.E.2d 436, 442–443 n. 10 (1994), citing *Landgraf v. USI Film Products*, 511 U.S. at 244, 114 S.Ct. at 1483, 128 L.Ed.2d at 229 ; see also Norman J. Singer, *Statutes and Statutory Construction* § 41.04 at 349–50 (5th ed.1993). To be specific, this means that, unless expressly stated otherwise by the statute, **such a statute will not apply to pending cases or cases filed subsequently based upon facts completed before the statute's effective date.** *See generally State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 738–739, 474 S.E.2d 906, 918–919 (1996). If a new procedural or remedial provision would, **if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case** unless the Legislature has made clear its intention that it shall apply

Public Citizen, Inc. at 334-335, 543-544 (emphasis added).

There was no question in *Findley* that the amendments did, in fact, affect substantive rights. The Court held:

...the legislative amendments to W. Va.Code §§ 33-6-30(b–c) are most certainly substantive in nature. The effect of such amendatory language is to extinguish any

litigable rights that have accrued as a result of this Court's holding in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), and to foreclose lawsuits that have been initiated as a result thereof... citing, *inter alia*, *Mildred L.M. v. John O.F.*, 192 W.Va. 345, 351 n. 10, 452 S.E.2d 436, 442 n. 10 (1994) ("It has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights." (emphasis and citation omitted)).

Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. at 93, 576 S.E.2d at 820; *see also* Syllabus Point 9, *Wampler Foods, Inc. v. Workers' Compensation Div.*, 216 W.Va. 129, 602 S.E.2d 805 (2004) ("Though a workers' compensation statute, or amendment thereto, may be construed to operate retroactively where mere procedure is involved, such a statute or amendment may not be so construed where, to do so, would impair a substantive right' citing Syllabus Point 6, *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996)").

Here, the crux of Petitioner's argument is that the 2015 amendment to *W. Va. Code* § 46A-2-125 should be given substantive retroactive effect to extinguish Mr. Lenahan's right of action to sue V&K for its abusive conduct

However, there is no clear, explicit, or express language that Petitioner cites in his brief for the proposition that the Legislature intended for the amendment to be applied retroactively. The only language Petitioner directs our attention to is the word "clarifying" at page 17 of Petitioner's brief. Although that language is not accompanied by a citation, Petitioner seems to be referring to the enacting clause of Senate Bill 542: "AN ACT to amend and reenact § 46A-2-125, § 46A-2-126 and § 46A-2-128 of the Code of West Virginia, 1931, as amended ... all relating to clarifying permitted and prohibited actions..." A.R. at 281. Petitioner's argument that simply including the word "clarifying" makes the entire amendment retroactively applicable is absolutely contrary to the cases cited above and the presumptions in this state against the retroactive applicability of statutes affecting substantive rights. Petitioner's argument is

completely at odds with this Court's recent decision in the *Findley* case, *supra*, which included similar language regarding clarification of existing law.

Here, however, not only is the amendatory language less forceful than that analyzed in *Findley*, but the Legislature also expressly stated in the enacting clause that they were making substantive changes, including "increasing permitted delinquency charges; modifying damages and penalties for violations; **modifying the limitation of actions brought under this chapter**; adjusting time allowed after discovery to correct an error without liability in certain circumstances; adjusting damages for inflation; and specifying venue of an action or proceeding brought by a consumer" (emphasis added). As was true in *Findley*, the Legislature could have stated that the changes were to be retroactively applied, but it failed to do so.

The cases cited in Petitioner's brief are not to the contrary. Syllabus Point 3 in *Sizemore v. State Workmen's Compensation Commissioner*, 159 W.Va. 100, 219 S.E.2d 912 (1975) does provide that "[a] law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application". That syllabus point addresses only *when* an amendment is retroactive, not *whether it can be retroactively applied*. On the latter point, the Court in *Sizemore* agreed completely with the holding in *Findley*:

The basis of the Court's decision in *Maxwell* [*v. State Compensation Director*, 150 W.Va. 123, 144 S.E.2d 493 (1965)] was the generally recognized rule that a workmen's compensation statute or amendment which affects substantive or contractual rights, and not merely procedural matters, cannot be given retroactive effect by judicial fiat and that legislative bodies must express a clear intent to make a substantive amendment retroactive before the courts may so apply the statute".

Sizemore, 159 W.Va. at 104, 219 S.E.2d at 914. In the end, in fact, the issue of whether an amendment could have retroactive effect wasn't even raised in *Sizemore*:

although Mr. Sizemore's death in 1970 was the result of an injury sustained in 1961, granting his dependents the benefits of the intervening 1967 and 1969 amendments is not equivalent to retroactive applications of these statutes. The contrary is true; this construction is strictly prospective, applying only to deaths occurring subsequent to the statutes' effective dates.

Sizemore, 159 W.Va. at 107, 219 S.E.2d at 916.

The second case cited by the Petitioner, *In re Petition for Attorney's Fees and Costs*, 234 W.Va. 485, 766 S.E.2d 432 (2014), is entirely consistent with *Sizemore* and *Findley*. As in *Sizemore*, in *In re Petition for Attorney's Fees and Costs*, this Court found that since the claimant there *prevailed after* the effective date of the amendment to the statute permitting an award of attorney fees, no question of retroactive application was therefore raised.

In this case, unlike the two cases cited by the Petitioner, there is no question that the abusive phone calls to the Plaintiff below were completed almost three years prior to the 2015 amendments to the WVCCPA, and the Plaintiff's right to bring a cause of action was likewise acquired almost three years before the law was amended. According to the language in the syllabus point from *Sizemore* quoted by the Petitioner, application of the 2015 amendments in this case would, in fact, constitute retroactive application of the 2015 amendment. Petitioner inherently admits that application of the amended language would diminish Respondent's substantive rights when it argues that the Court below "should have applied the language of the 2015 amendment directly; that is, should have ruled that the 2015 amendment **extinguished Mr. Lenahan's cause of action** (emphasis added).¹¹

¹¹ Petitioner's argument here is especially absurd. Though this Court need not reach this issue of interpreting the 2015 amendment because it should not be applied retroactively, Petitioner makes the bold statement that pursuant to the amendment "...a collector is permitted to call a debtor up to 30 times in one week before the calling can be considered abusive or oppressive." Petitioner's Brief at 18. Nothing could be further from the truth because the

D. The lower Court’s finding that Petitioner significantly “ramped up” the number of calls that it made is supported by the undisputed evidence in the record, and its decision that, in this case, considering all of the evidence, an abrupt increase in the frequency of calls and a decrease in the interval of time between those calls was evidence of intent “to annoy or harass the plaintiff rather than to communicate with him” is likewise fully supported and hardly represents an abuse of the Court’s discretion.

In its fourth assignment of error, the Petitioner complains that “[t]he lower Court committed error in factually finding that Defendant's auto dialer calls made to Plaintiffs phone, unanswered and not returned by Plaintiff; alone, constituted evidence of Defendant's intent to annoy, abuse or oppress Plaintiff sufficient to support a violation of *W. Va. Code*, § 46A-2-125(d).”

1. Petitioner’s use of an automated dialer does not shield it from liability

Petitioner controlled the automatic dialer and determined how many telephone calls were made to Mr. Lenahan each day and on which days calls were made. Tr. at 31, A.R. at 038. Simply because Petitioner found it more convenient to use a computer to place the telephone calls, instead of a live human, does not mean that Petitioner can absolve itself of the information it should have known, and indeed did know, *i.e.* that Petitioner was in fact contacting Respondent’s telephone. Had Petitioner ever taken the time and energy to utilize a human being to make a single one of the 252 telephone calls, Mr. Lenahan’s outgoing message would, in fact, have identified him as the owner of the telephone number. Tr. at 139, A.R. at 145. This would have been a redundant confirmation however, as Petitioner never testified that it ever doubted that the telephone number given to it by its principal belonged to Respondent.

amendment broadened §125. First, the legislature did not remove the prohibition against calls “at unusual times or at times known to be inconvenient, with the intent to annoy, abuse, oppress, or threaten any person.” Second, the Amendment simply takes the issue from the trier of fact and dictates that, as a matter of law, calling more than 30 times in a single week is a *per se* violation of the Act. Third, the amendment removes the requirement that the calls be found to be placed “repeatedly or continuously” to violate the Act. Fourth, the amendment applies a “reasonable person standard – just as the trial court did here with its eloquent analogy found in the May 22, 2012 Memorandum opinion. A.R. at 326.

Respondent testified that he received a letter from Petitioner that informed him the Petitioner was trying to collect a debt that he allegedly owed to ADT. Tr. at 139-140, A.R. at 145-146. Respondent also testified that the telephone Petitioner was calling had Caller ID, so he would have known exactly who was calling him. Tr. at 139, A.R. at 145. Petitioner's assertion in its second assignment of error that the trial court's conclusion "...that Defendant knew Plaintiff specifically knew it was calling him and, that he specifically did not want to talk to it; as opposed to any other possibility such that Plaintiff himself did not know Defendant was trying to contact him or for what purpose", Petitioner's Brief at 15, is flatly contradicted by the record.

Petitioner's argument that it could not have intended to call Mr. Lenahan simply because the computer it chose to use to generate the calls was programmed to terminate the call when an answering machine was detected¹² is simply absurd because it shifts all liability away from the debt collector. This is nonsensical, especially here, where Petitioner admits that its automatic dialer was programmed to hang-up when it detected an answering machine. Petitioner is essentially arguing that because it intentionally made a conscious decision to terminate the call when an answering machine picked up so that it could not listen to the outgoing voicemail message, an intentional ignorance on behalf of Petitioner, should somehow shield it from liability.

2. **The lower Court's conclusion that Petitioner's conduct was intended to annoy, abuse, oppress, or threaten Respondent is clearly based on the undisputed evidence in the record.**

Judge Burnside ruled that the first 22 telephone calls placed to Mr. Lenahan by Petitioner were made "for a legitimate purpose such as to inform them of the delinquency or to make payment arrangements" and that "[s]ending a debtor a collection letter and calling them twenty-

¹² See Petitioner's Brief at 13.

two times in the initial two weeks of collection is not something that this Court finds to be oppressive without something further”. Conclusions of Law Nos. 6 and 8, Verdict Order at 4-5, A.R. at 004-005. He then found that after the first 22 calls, Petitioner “ramped-up” the number of calls placed, and concluded that Petitioner “increased its volume and frequency of collection calls to Mr. Lenahan in an attempt to harass or oppress him into answering Defendant’s telephone calls”. Conclusion of Law No. 9, Verdict Order at 5-6, A.R. at 005-006. Petitioner asserts in its fourth assignment of error that “this inference from the facts is further not supported by the evidence”. Petitioner’s Brief at 19. In doing so, Petitioner ignores its own evidence.

In fact, the *undisputed* evidence from Petitioner’s own call logs indicates that the first twenty-two (22) calls to Respondent after its letter and between March 10 to March 25, 2012 were placed on nine (9) separate days during a fourteen (14) day period, and the Defendant never called more than three (3) times in a single day. However, beginning on March 26, 2012, Petitioner placed six (6) calls to Respondent, three (3) of which were separated by less than an hour. The very next day, Petitioner placed five (5) additional calls to Mr. Lenahan with as little as twenty-eight (28) minutes separating some calls. On the third consecutive day, March 28, 2012, Petitioner again placed six (6) calls to Mr. Lenahan with some calls separated by only thirty-two (32) minutes.¹³ Petitioner admits in its brief that “the week with the most calls was the

¹³ The Petitioner’s call logs were introduced and accepted into evidence in the trial (Tr. at 90, A.R. at 096) but were apparently not included with the Transcript provided by the Court Reporter and are not included in the Appendix Record. There was, however, no dispute between the parties as to the number of calls made or as to the date and time of the calls. The summary of the calls that occurred in March discussed herein was taken from Conclusions of Law Nos. 10-11 in *Plaintiff’s Proposed Order* (see A.R. at 302- 303), which was not disputed by Petitioner and was adopted by Judge Burnside as findings of fact in his Memorandum to the parties dated May 22, 2015. See *id.* at *3, A.R. at 327. The initial 22 calls, together with the additional 17 made on March 26-28 total 39 calls in March from the 10th through March 28; both parties agree that a total of 44 calls were made in the month of March. See Finding of Fact 7(a) in *Plaintiff’s Proposed Order* at *2, A.R. at 296, and Defendant’s Supplemental Post-Trial Memorandum of Law at *2, A.R. at 275. In addition, the transcript confirms that 3 calls were made on March 12 (Tr. at 31, 33-34, A.R. at 038, 040-041), one call was placed on March 13 (Tr. at 34, A.R. at 041), three calls were made on March 14, *id.*, and six calls were placed on March 28, together with the time at which each of the six calls occurred. Tr. at 35-36, A.R. at 042-043.

week of March 26th when 22 calls were made”, Petitioner’s Brief at 19. However, Petitioner conveniently ignores the fact that 17 of those calls were placed in a mere three days. The number, dates, and times of each call are undisputed as the information was directly taken from Petitioner’s own collection records, Respondent’s only exhibit at trial, and are therefore not clearly, or even slightly, erroneous. Moreover, describing this increase as a “ramping up” of the number and frequency of the calls is entirely fair because that’s exactly what Petitioner did beginning March 26, 2012.

3. The Petitioner’s assertion that its conduct was not intended to annoy, abuse, oppress, or threaten Respondent is not credible to anyone even remotely familiar with the economic conditions in this country and the common practices of debt collectors.

There exists an ugly presumption in the world of debt-collection: simply because someone becomes in arrears, that person’s creditor, sitting in the position of power, somehow has an inherent right to harass the debtor. This is exactly the attitude that the WVCCPA was enacted to dispel, and the Act itself protects consumers and others from the abuse and harassment all too common in the world of debt collection. When a debt collector engages someone in an attempt to collect a debt, that communication is not simply a common conversation between two acquaintances, it is a special conversation, elevated to a higher plain, fraught with the opportunity for abuse and deserving of federal and state regulation. This is important to consider because these weren’t two people on a park bench, this was a regulated debt collector engaging in regulated activity. In footnote 2 of Judge Burnside’s memorandum, A.R. at 326, the trial court makes this distinction. The court basically says that if this behavior would be considered oppressive or abusive in the real world, it’s certainly abusive in the debt collection world where

debt collection activity is highly regulated, and debts collectors are strictly forbidden from abusing, harassing, and annoying consumers.

Petitioner's response to the trial court's reasoned analogy is to make a long and tortured effort (*see* Petitioner's Brief at 15-16) to draw a distinction between debt collection and Judge Burnside's hypothetical in the opposite direction. In doing so, Petitioner attempts to call on the ugly presumption identified above - that some level of annoyance, of harassment is acceptable when someone owes a debt and cannot pay. Such an attitude flies in face of the WVCCPA and this Court's prior precedent requiring liberal interpretation to achieve the purpose of a remedial statute designed to give consumers a cause of action when such a cause of action may not otherwise exist. The Legislature agreed when it enacted the WVCCPA that communication by debt collectors is often different from casual conversation because, in reality, communication with debt collectors can often be annoying, abusive, oppressive, or threatening:

Q (by Mr. Broadwater): And you believed Valentine & Kebartas was calling you?

A (by Mr. Lenahan): Yes.

Q: Why do you believe they were calling you?

A: I believe they were calling me connected to a debt that I believe it's ADT said that I owed them.

Q: Did you owe ADT any money?

A: No.

Q: Did you ever tell anyone that you didn't owe ADT any money?

A: Yes, I did.

Q: What did you tell them?

A: When I spoke to ADT when they originally contacted me, I told them that they were charging me for an installation in a home that wasn't mine, didn't own the home and it wasn't I that actually ordered the installation.

Q: Who was it that ordered the installation?

A: The homeowner.

Q: Gary, when they were calling you to collect this debt, could you afford to pay anything?

A: No.

Q: How much money were you making at the time?

A: I wasn't making anything. I just had my Social Security.

Q: And that was throughout the entirety of 2012?

- A: Yes.
- Q: So why wouldn't you answer Valentine & Kebartas's telephone calls, Gary?
- A: Well, I stopped answering -- I had originally answered calls but I stopped answering calls because it was just -- they were just coming -- you know, I was getting --
- Q: And let's clarify here, Mr. Lenahan, you were getting calls from sources other than Valentine & Kebartas?
- A: Yes, I was, I was getting calls from other than Valentine & Kebartas.
- Q: So, at the beginning, you were answering the phone calls and then, at some point, you stopped?
- A: In the beginning, yeah, I answered all phone calls and then --
- Q: And why did you stop answering the telephone?
- A: I stopped answering the phone calls because I explained to everyone that I had talked to on the phone that I lost everything. I lost my business, lost my family, lost my house, my home, everything, and it all - you know, just basically everything just came crashing down around me and I tried to do what I could do but I had no money.
- Q: So there was no way for you to pay this or any other debt?
- A: No. But this one really -- was really aggravating, because here's somebody trying to make me pay a debt that really wasn't mine....
- Q: Tell me a little bit, Mr. Lenahan -- you said the calls were especially bad. How did these calls affect you personally?
- A: Well, like I said, a lot of things had gone wrong in my life and then I got these continuing phone calls and, you know, sometimes you get to the point where I just felt like a failure. You just get the calls over and over and over again and they would just keep coming and it just really made me feel, you know, really bad, so -- and it was really stressful for Sarah too, because she would, you know, basically jump every time the phone rang.

Tr. at 135-137, 140, A.R. at 141- 143, 146. Further, on cross examination by Mr. Dunn, Mr.

Lenahan explained:

- Q: (By Mr. Dunn): Mr. Lenahan, as I understand it from your deposition testimony, you lived in California for a period of time; right?
- A: (By Mr. Lenahan): That's correct.
- Q: You were married --
- A: Yes.
- Q: -- and you got divorced?
- A: Yes.
- Q: And did you not say in your deposition that your ex-wife ran up about \$35,000 worth of credit card debt in your name?
- A: The credit card -- well, she ran up some debt and my son ran up.

- Q: Okay. And so you -- I believe my memory is correct, it was about \$35,000?
- A: At least that, yeah.
- Q: Okay. And you alluded to here on direct examination but you testified that you didn't have the ability to pay that debt; correct?
- A: That's correct.
- Q: Okay_ And you testified in your deposition -- again, correct me if I'm wrong -- for a period of about a year you were getting debt collection calls from debt collectors for a number of different debts that you owed; right?
- A: It was a period of during that year, during 2011, I guess it would be.
- Q: And you testified in your deposition you were getting as many as maybe 20 or 30 calls a day; correct?
- A: There were a lot, yes.
- Q: And you were getting calls -- you were getting calls in the morning and getting calls in the evening; correct?
- A: Correct.
- Q: So you were getting calls from a number of debt collectors other than Valentine & Kebartas?
- A: Yes.
- Q: Okay. And you simply started to develop a habit of if somebody called your phone, be it your home phone or your cell phone and you didn't know the number, you just wouldn't answer the call; right?
- A: If I knew who it was, yes. Yes.
- Q: Because you didn't want to talk to anyone who may be a debt collector; correct?
- A: That was correct.

Tr. at 142-144, A.R. at 148-150.

As heartbreaking as this is, Mr. Lenahan is by no means unique. People everywhere are one setback away from financial disaster – the loss of a job, a sudden medical expense, and suddenly, there's no way to pay the bills. A recent survey by the Federal Reserve Board asked respondents how they would pay for a \$400 emergency. The answer: 47 percent of respondents said that either they would cover the expense by borrowing or selling something, or they would not be able to come up with the \$400 at all.¹⁴

¹⁴ Source: <http://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/> (last viewed June 20, 2016)

In light of this economic situation, Petitioner asserts that

Defendant had no way of knowing Plaintiff's personal situation: whether he had the same phone number; had moved; was screening calls because he was getting calls from other collectors; disputed the debt; had money to pay the debt; etc.; its intent should not have been inferred from the simple fact that its computer called a number thought to be Plaintiff's and he never answered the phone; the fact that he did not answer the phone is the only conclusion that was proper to be drawn from these facts and nothing more. Petitioner's Brief at 16.

This assertion is simply not credible to anyone even remotely familiar with the economic conditions in this country, not to mention the state of West Virginia, and the common practices of debt collectors the WVCCPA was intended to curb. Respondent was all too familiar with debt collectors by the time Petitioner began to call him, and it's perfectly understandable why he had no desire to communicate with Petitioner. As Judge Burnside noted, Petitioner had another alternative to calling Mr. Lenahan 252 times: if Petitioner was not satisfied with its repeated and continuous telephone collection calls to the same number for the sole purpose of collecting a debt from Respondent, Petitioner was at all times free to file a civil action to collect the alleged debt and if a judgment was awarded, defendant could then have initiated legal collection procedures. May 22 Memorandum, footnote 3, A.R. at 327.

Instead, Petitioner continued to harass the Respondent. Petitioner continued to reach into Respondent's home and make his telephone ring. Petitioner continued to reach out again and again, despite Mr. Lenahan's continued and repeated refusal to respond to Petitioner's advances. After twenty-two of Petitioner's advances went unanswered, Petitioner was done taking it easy on Mr. Lenahan and began a campaign of two-hundred thirty (230) additional collection calls placed by a computer programmed to hang up when it detected an answering machine or voicemail to the only telephone number Petitioner had for Respondent as often as 6 times a day, over a period of about 8 months. After hearing all the evidence, Judge Burnside found that

Petitioner's repeated and continuous calling of the Respondent's telephone rose to the level of unreasonable oppression and/or abuse and then went a step farther and found that Petitioner's intended to annoy or harass Respondent. These conclusions are solidly based in the record and should not be disturbed by this Court.

4. The Circuit Court's selection of the three days period during with Petitioner ramped up its calls as the point in time when Petitioner's intent to annoy, abuse, oppress, or threaten Respondent was well founded and was not arbitrary.

Likewise, there is absolutely no merit to Petitioner's claim that the Court below "arbitrarily picked a point in time with which to conclude that any calls thereafter was evidence of unreasonable conduct on behalf of Defendant". Petitioner's Brief at 20. Rather, the facts indicate that in the three days of March 26 through 28, 2012, Petitioner placed a total of 17 calls to Mr. Lenahan. Over the three day period of March 26 through 28, Petitioner placed an average of 5.7 calls per day to Mr. Lenahan; during the first 15 days beginning on March 10, it placed an average of 1.5 calls per day. There is nothing arbitrary about the Court taking notice of an almost a four-fold increase in the average number of daily calls, a fact taken directly from Petitioner's own records.

Petitioner also argues that any judicial determination that any specific number of calls violates § 46A-2-125 would be, by definition, arbitrary. Petitioner's Brief at 20-21. When the Legislature enacted the operative version of that section in 1974, it didn't set a specific limit,¹⁵ rather, it left the determination of whether a debt collector's conduct was unreasonably oppressive or abusive to be determined by a trier of fact based on the circumstances of each individual case, just as the Circuit Court did here. Judge Burnside didn't establish a rule that a

¹⁵ The fact that the Legislature specifically prohibited calling a person more than 30 times in a single week, taking the question of liability out of the hands of the trier of fact and making so many calls a *per se* violation, in the 2015 amendment to § 46A-2-125 is, however, indicative that the Legislative always viewed, and still views, an excessive number of calls to be abusive, absent any other evidence of abuse.

specific number of calls over a specific period of time would be abusive in *any* case; he simply decided that, in *this* case, after hearing all evidence presented, an abrupt increase in the frequency of calls and a decrease in the interval of time between those calls was evidence of Petitioner's intent "to annoy or harass the plaintiff rather than to communicate with him." May 22 Memorandum at *3, A.R. at 327. Judges are called upon every day to make determinations of how the law applies to the facts of each case before them. Certainly, different judges might reach slightly different results, but that doesn't render all decisions arbitrary. To suggest that the exercise of such discretion is somehow innately arbitrary or capricious indicates a failure to understand the function of the judicial branch of government at a fundamental level.

VI. Conclusion

This is a case where a debt collector felt entitled to pester, annoy, and harass the Respondent for the sole reason that Petitioner thought Respondent owed a debt. Under Petitioner's view of the law, it could have called the Respondent "over and over and over again" until his dying day without violating the WVCCPA.¹⁶ This is an entirely unreasonable and absurd interpretation. In what other context could any person or entity pester, annoy, or harass someone for the rest of their lives without facing liability? Petitioner's interpretation is based on the ugly presumption that people in debt somehow deserve to put up with some level of abuse simply for not being able to afford to pay all their bills. That is Petitioner's view of the world, and its own records and testimony prove this. When Respondent refused to engage the Petitioner after the first 22 calls, Petitioner turned up the heat and ramped up the calls. Why did Petitioner do this? What was Petitioner's goal? The lower Court looked at all the relevant evidence and

¹⁶ A.R. at 067.

concluded that the purpose for the calls could only have been to abuse, annoy, or harass the Respondent into answering the telephone and engaging his abusive debt collector.

Petitioner argues that because Respondent didn't give in to the harassment and answer the telephone calls, Respondent has no cause of action. This is an absurd and backwards conclusion as it would place a duty of the person being harassed to engage with their abuser to state the glaringly obvious: the calls go unanswered because the person being called doesn't want to talk to the caller. Whether such communication occurs in the realm of debt collection or courtship, actions speak louder than words. Demanding that the person you're harassing engage you and state the obvious (that the calls are unwanted) is little more than a cop-out designed to shift the burden from the regulated party to the protected individual.

It does not matter whom Petitioner was calling because the Petitioner's calls were intended to harass the person being called. If Petitioner had the wrong number and was actually calling some person other than Respondent, that person would have had the same claims available to them under the WVCCPA because the cause of action accrues to *any person* who is harassed under *W. Va. Code* § 46A-2-125, which specifies that “[n]o debt collector shall unreasonably oppress or abuse **any person** in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person **or another**” (emphasis added). It is entirely consistent with the applicable statutory language as enacted in 1974 to find that under the specific facts in this case, call volume, along with the frequency and circumstances surrounding the calls, can be deemed unreasonably oppressive or abusive.

Likewise, Judge Burnside followed well established precedent when he declined to apply the provisions of the 2015 amendment to the WVCCPA retroactively in a case where the bad acts, the filing of the Complaint, and the trial all occurred prior to amendment. Affirming that

decision would not establish a precedent that a particular number or frequency of collection calls is illegal, it would merely confirm the trier of fact's duty to consider all relevant evidence in making what is, by its very nature, a case-by-case analysis.

If Petitioner seriously questions how it could ever establish a business practice of attempting to communicate with a debtor to collect a debt by phone without being concerned that its conduct doesn't violate the WVCCPA, perhaps it should consider eliminating practices which a reasonable person would interpret as unreasonably oppressive or abusive. Perhaps it shouldn't respond to a debtor's refusal to answer with more telephone calls. Petitioner can always file suit as long as the debt is indeed owed. Of course, then Petitioner would actually have to prove his case, something Petitioner has thus far declined to do, instead choosing to harass the Respondent in hopes that he would simply pay money he denied owing.

In his May 22 Memorandum, Judge Burnside eloquently answered the question of "[h]ow many attempts to communicate met with silence are necessary for the silence to be regarded as a signal of a preference not to communicate after which continued attempts become offensive to the target?" in this way: "it is possible that the sheer number of attempts to communicate to which there is no response may constitute abuse, oppression, or harassment if the attempts continue beyond the point at which a reasonable person should conclude that communication is not desired". Whatever that reasonable number is will necessarily depend on all the other facts of the case. It is simply unreasonable to force another's telephone to ring hundreds of times without answer. In this case, the repeated and continuous unsuccessful action in hopes of a different result is not just the definition of insanity, it is the definition of abuse and harassment.

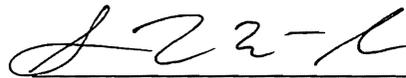
In short, the trial court's findings and conclusions of fact were sound, based on the record at trial, and were not clearly erroneous. Its interpretation of the applicable law was also correct,

and the application of the facts to the applicable law was neither arbitrary nor capricious. The trial court's decision should be affirmed by this Court.

Respectfully Submitted,

GARY J. LENAHAN

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Dated: June 30, 2016

NO. 16-0127

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VALENTINE & KEBARTAS, INC.

DEFENDANT BELOW/PETITIONER

v.

GARY J. LENAHAN

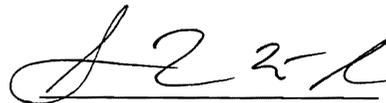
PLAINTIFF BELOW/RESPONDENT,

Certificate of Service

I, Steven R. Broadwater, Jr., counsel for Respondent, do hereby certify that service of the "*Brief of Respondent Gary L. Lenahan*" was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 30th day of June, 2016.


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